

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Arnulfo Arias-Orosco ("Petitioner") moves this Court to reduce his time in federal custody pursuant to 28 U.S.C. § 2255, arguing that the 1995 United States Attorney General Memorandum offers up to two levels downward departure from the applicable guideline sentencing range in return for an alien's concession of deportability and agreement to accept a final order of deportation. For the following reasons, the Court DENIES the motion.

Discussion

On May 31, 2011, pursuant to a written plea agreement, Petitioner pled guilty to Information charging a violation of 8 U.S.C. § 1326 (a) and (b). *See Plea Agreement*, Doc. No. 15. This Court sentenced Petitioner on August 16, 2011, to one year imprisonment and three years of supervised release. *See Judgment*, Doc. No. 23.

1 Title 28 of the United States Code, Section 2255 provides that if a petitioner's motion, file, and
2 records "conclusively show that the movant is entitled to no relief" the Court summarily may dismiss the
3 motion without sending it to the United States Attorney for response. *See* 28 U.S.C. § 2255(b). The
4 rules regarding Section 2255 proceedings similarly state that the Court summarily may order dismissal
5 of a 2255 motion without service upon the United States Attorney only "[i]f it plainly appears from the
6 face of the motion, any attached exhibits, and the record of prior proceedings that the moving party is
7 not entitled to relief . . .". Rule 4(a), Rules-section 2255 Proceedings (West 2009). Thus, when a
8 movant fails to state a claim upon which relief can be granted, or when the motion is incredible or
9 patently frivolous, the district court may summarily dismiss the motion. *Cf. United States v. Burrows*,
10 872 F.2d 915, 917 (9th Cir. 1989); *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir. 1985).

11 A defendant may waive his right to file a § 2255 motion to challenge his sentence, but such a
12 waiver must state so expressly. *United States v. Nunez*, 223 F.3d 956, 959 (9th Cir. 2000). However, a
13 defendant may not waive an ineffective assistance of counsel claim challenging the knowing and
14 voluntary nature of the plea agreement or the voluntariness of the waiver itself. *United States v.*
15 *Rahman*, 642 F.3d 1257, 1259 (9th Cir. 2011); *United States v. Jeronimo*, 398 F.3d 1149, 1156 n. 4 (9th
16 Cir. 2005). Petitioner's plea agreement states in part:

17 In exchange for the Government's concessions in this plea agreement, defendant waives, to
18 the full extent of the law, any right to appeal or to collaterally attack the guilty plea,
19 conviction and sentence, including any restitution order, unless the Court imposes a custodial
sentence above the greater of the high end of the guideline range recommended by the
Government pursuant to this agreement at the time of sentencing or statutory mandatory
minimum term, if applicable.

20 (3:11-cr-01804-AJB, Doc. No. 15 at 3.) The Ninth Circuit approves of such waivers on public policy
21 grounds, reasoning that finality is "perhaps the most important benefit of plea bargaining." *United*
22 *States v. Navarro-Botello*, 912 F.2d 318, 322 (9th Cir. 1990). Courts will generally enforce a defen-
23 dant's waiver of his right to appeal if: (1) "the language of the waiver encompasses the defendant's right
24 to appeal on the grounds claimed on appeal," and (2) "the waiver is knowingly and voluntarily made."
25 *United States v. Martinez*, 143 F.3d 1266, 1270-71 (9th Cir. 1998). The Court concludes that both of
26 these requirements are met in this case. Accordingly, Petitioner's motion is barred and must be
27 dismissed because of his plea agreement waiver.
28

Even if Petitioner had not waived his right to attack his conviction and sentence, Petitioner's motion would fail on the merits. Petitioner's argument that the Court should make a further departure because he is a deportable alien and not eligible for housing in a minimum security prison or community corrections placement. By statute, the Court may depart downward only if there are "aggravating or mitigating circumstances . . . not adequately taken into consideration by the Sentencing Commission." 18 U.S.C. § 3553(b) and by law the Court can depart outside the Advisory Guideline System for reasons set forth in the factors of and policy reasons behind the Federal Sentencing Statute, 18 U.S.C. § 3553 (a). All relevant factors were taken in to consideration at the time of Mr Arias' sentence including placement and other options regarding his custodial sentence.

Conclusion

Based on the foregoing reasons, the Court DENIES Petitioner's Motion to Vacate Under 28 U.S.C. § 2255 [Doc. No. 24].

IT IS SO ORDERED.

DATED: September 26, 2011

Hon. Anthony J. Battaglia
U.S. District Judge